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January 22, 2001

VIA HAND DELIVERY

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, DC 20054

Re: WT Docket No. 99-217
Joint Comments of CoServ, L.L.C. and MultiTechnology Services, L.P.

Dear Ms. Salas:

Enclosed for filing in accordance with Commission rules please find an original and four (4) copies of the Joint Comments of CoServ, L.L.C. and MultiTechnology Services, L.P. responding to the Commission's further notice of proposed rulemaking in the docket referenced above.

If you have any questions or comments concerning this filing, please feel free to contact me. Thank you.

Sincerely,

Lawrence Freedman /RLD

Lawrence R. Freedman
Counsel for CoServ, L.L.P. and MultiTechnology Services, L.P.

Enclosures

Copies rec'd 0+4
A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57

JOINT COMMENTS OF
COSERV, L.L.C. AND MULTITECHNOLOGY SERVICES, L.P.

TABLE OF CONTENTS

INTRODUCTION 1

DISCUSSION 2

I. Exclusive Access Arrangements for Residential MTEs 2

A. Residential MTE owners do not have the same degree of market power to limit tenant choices as commercial MTE owners 2

B. Residential MTE exclusive access arrangements convey very important countervailing benefits to any limit on tenant choice 3

II. Pre-Existing Exclusive Access Arrangements 4

A. Interference with existing contracts is a drastic measure that will undercut the substantial network facilities investment of small competitive providers 4

B. Interference with existing access arrangements is not necessary to ensure MTE customer choice 5

III. Exclusive Marketing Agreements 7

IV. Nondiscriminatory Access Requirement 8

CONCLUSION 10

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JOINT COMMENTS OF COSERV, L.L.C. AND MULTITECHNOLOGY SERVICES, L.P.

CoServ, L.L.C. (dba CoServ Communications) and MultiTechnology Services, L.P. (dba CoServ Broadband Services) (collectively "CoServ") hereby jointly respond to the Further Notice of Proposed Rulemaking[1] in the above-captioned proceeding.

INTRODUCTION

CoServ is a small, Texas-based competitive local exchange carrier. The centerpiece of CoServ's current business model is the MTE. Under this model, CoServ offers itself to MTE property owners as a competitive alternative to the incumbent LEC to own, maintain, and

[1] *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, FCC 00-366 (rel. Oct. 25, 2000) ("FNPRM").

manage the telecommunications system at a new or existing MTE property. Once enlisted by an MTE property owner, CoServ will often invest in and install its own telecommunications plant and equipment at an MTE to serve the community pursuant to an agreement with the property owner. To date, CoServ has made substantial investments in MTE network facilities consistent with its contractual arrangements with MTE property owners and continues to pursue this core market entry strategy as an effective and marketable way to bring state-of-the-art, competitively priced telecommunications services to MTE tenants.

Against this backdrop, CoServ believes that it has a unique and important perspective on a number of the issues that the Commission is now contemplating in the FNPRM. CoServ's comments on each of these issues are provided below.

DISCUSSION

I. Exclusive Access Arrangements for Residential MTEs

In establishing a ban on exclusive access arrangements at commercial MTEs, the Commission concluded that such arrangements "limit the potential for limiting tenants' choices, without any countervailing benefits."[2] The Commission was unsure, however, whether the same could be said of exclusive access arrangements at residential MTEs. In CoServ's experience, the Commission's reservation about extending the ban on exclusive arrangements from the commercial to the residential MTE market is warranted.

A. Residential MTE owners do not have the same degree of market power to limit tenant choices as commercial MTE owners.

The Commission's primary concern with commercial MTE exclusive access arrangements was the apparent disincentive for commercial MTE building owners to maximize tenant welfare in light of the long duration of commercial leases, significant relocation costs, and

[2] *FNPRM* at ¶ 34.

purported shortages of alternative commercial rental space.[3] These disincentives to accede to tenant telecommunications service choices is far less apparent in the residential MTE market. The duration of leases typically run no longer than a year and residential relocation costs are generally quite a bit less than the costs raised in moving a business. Moreover, the residential MTE market is not limited to the same degree by the zoning and environmental constraints that reduce available alternative commercial space.

Residential MTE tenants have a greater degree of flexibility in mitigating (or even simply avoiding) any limits that an MTE owner may place on their telecommunications service provider preference through an exclusive access arrangement. The residential MTE market is highly competitive and building owners are highly motivated to create a marketable product to both retain existing tenants and court new tenants. Exclusive access arrangements at residential MTEs do not "limit tenants' choices" to the same degree as in the commercial market.

B. Residential MTE exclusive access arrangements convey very important countervailing benefits to any limit on tenant choice.

In addition to decreased MTE owner market power to limit residential tenant choice, exclusive access arrangements in the residential MTE market create greater tenant benefits than in the commercial context. For instance, and as noted by the Commission in the FNPRM, residential MTE owners can (and do) condition exclusive deals on the availability of more attractive telecommunications service offerings for tenants (e.g., discounted rates, increased service quality, or state-of-the-art technologies or services).

Perhaps a more fundamental and critical benefit to residential MTE tenants of exclusive access arrangements is the incentive that such arrangements give to competitive providers to serve a residential MTE in the first place. Competitive providers, like CoServ, must justify the

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[3] *FNPRM* at ¶ 31.

substantial facilities investment required to serve a residential MTE with some assurance of steady revenue production. As previous parties have commented, the revenue potential at a residential MTE is typically smaller than at a comparable commercial MTE. Moreover, without exclusive access arrangements, there is an increased risk that substantial, up-front facilities investment will be made to ultimately serve only a handful of residents at an MTE.

Accordingly, CoServ believes that a ban on exclusive access arrangements for residential MTEs in the name of accelerating and expanding competitive choice may backfire on the Commission. Exclusive access in the residential context is a distinctly more important incentive for CLEC facilities deployment at MTEs than in the commercial context. By taking away this incentive, the Commission may actually be creating obstacles to competitive choice in the residential MTE market, rather than taking them away.

II. Pre-Existing Exclusive Access Arrangements

Whether or not the Commission prohibits exclusive access arrangements in all or just commercial MTEs, the Commission should not disturb pre-existing CLEC access arrangements.

A. Interference with existing contracts is a drastic measure that will undercut the substantial network facilities investment of small competitive providers.

The Commission's caution in the FNPRM about interfering with existing CLEC access arrangements is well deserved. If the Commission were to extend a prohibition on exclusive access arrangements to pre-existing agreements, it would be striking a direct and stunting blow to competitive, facilities-based competition.

As noted above, exclusive access arrangements can be an important market tool to motivate competitive network deployment at, and service to, MTEs. Indeed, these arrangements have been an important tool in existing CLEC access agreements, in many cases, forming the fundamental consideration for CLEC deployment of facilities at MTEs. By taking away the fully

negotiated and relied upon protection of exclusivity, the Commission would effectively eviscerate the cornerstone of a CLECs investment decision to serve an MTE and instantly remove value from that investment. This is no small thing. For a number of small, competitive providers, like CoServ, the network facilities deployed at MTE properties effectively represents their entire network and a crucial basis for their successful entry into a highly competitive market.

The express goal of the Federal Telecommunications Act of 1996 was to encourage the creation of facilities-based competitive alternatives to the incumbent LEC. As noted in Section I above, it is suspect, in certain circumstances, whether a ban on CLEC exclusive access arrangements will foster the acceleration of competitive facilities-based deployment at MTEs at all. Extending such a ban to existing arrangements, however, will most certainly be a distinct and significant step backward in facilities-based competition.

B. Interference with existing access arrangements is not necessary to ensure MTE customer choice.

Other commenting parties have, and probably will, inform the Commission of the strict and difficult barriers that the law places in front of interfering with existing contracts. CoServ believes that the Commission's interference with existing CLEC access arrangements would not clear these barriers. In the Commission's estimation in the FNPRM, the general test for its authority to interfere with existing agreements is whether such an action would be "necessary to serve the public interest."[4] In the context of existing access arrangements, the Commission restates the question into whether interfering with existing access arrangements is "necessary to

[4] *FNPRM* at ¶ 163.

ensure that customers obtain the benefits of the more competitive access environment envisioned in the 1996 Act."[5] CoServ asserts that the answer to the Commission's question is no.

As an initial matter, and as explained in Section I above, there is a real question as to whether prohibiting exclusive access arrangements will promote competitive access at all, much less "ensure" it. Perhaps more importantly, however, is that real world market forces exist that ensure competitive choice in MTEs, even if a provider and an MTE owner have an existing exclusive access arrangement.

A primary example of MTE customer choice, with or without exclusive access arrangements, is found in CoServ's current policy to allow other providers to use its MTE facilities to serve tenants requesting service from that provider. In furtherance of this policy, CoServ now has approved state tariffs that set forth reasonable rates, terms, and conditions for access to and use of CoServ MTE facilities. While CoServ's policy is voluntary, it is certainly influenced by its real world market situation – a situation that is not unique. CoServ has an ongoing business relationship with MTE property owners that, in turn, are highly motivated in a competitive MTE market to respond to tenant requests for competitive choices. By adopting a policy of "compensated access" to its facilities, CoServ can maintain an efficient and solid relationship with MTE property owners by accommodating tenant demand for service options. Interfering with existing access arrangements and the legal, practical, and competitive baggage that such action would entail is clearly not "necessary" to ensure competitive choice in MTEs.

What is necessary, however, is Commission intervention to ensure that access alternatives, like CoServ's "compensated access" policy, can thrive. In the case of "compensated access," CoServ has been battling Southwestern Bell Telephone Company ("SWBT") for two years over SWBT's use of CoServ MTE facilities, but refusal to pay the rates in CoServ's

[5] *FNPRM* at ¶ 163.

approved tariff. SWBT has not only attempted to dodge "compensated access" under CoServ's tariff, it has now also refused to negotiate or include reasonable rates, terms, and conditions for interconnection with and use of CoServ's MTE network in CoServ's interconnection agreement with SWBT. Despite sound legal and practical authority for incorporating this network arrangement into an interconnection contract, SWBT has now forced CoServ to arbitrate the issue at the Public Utilities Commission of Texas. CoServ has also been forced to file a separate complaint with the Texas PUC to redress over two years of SWBT's failure to appropriately pay for using CoServ's MTE network.

Interfering with existing MTE access arrangements is not necessary to ensure competitive choice. Ensuring that alternatives, like "compensated access, are available and efficient is. In the case of "compensated access," the Commission should definitively recognize a competitive carriers right to establish and obtain reasonable compensation for the use of its network at MTE properties. The Commission should also recognize a competitive carrier's right to include such arrangement in its interconnection contracts with other providers. In doing so, the Commission will be establishing an efficient and effective alternative to interference with existing and, in many cases, necessary MTE arrangements that will advance facilities-based competition at MTE properties greatly.

III. Exclusive Marketing Agreements

The Commission should not prohibit exclusive marketing agreements. Indeed, in CoServ's view, exclusive marketing agreements are a functional, middle-ground MTE business practice that the Commission should view as a win-win situation. The arrangement does not keep any provider from physically accessing an MTE to serve a customer. Moreover, the arrangement serves as a key incentive for competitive facilities deployment.

Exclusive marketing agreements do not convey any access advantage; they convey, at most, a sales advantage. Just as a provider with an exclusive marketing arrangement has devoted resources to obtain the arrangement (e.g., special service rates or revenue sharing or commissions to the property owner), a competing provider can likewise devote resources to reach MTE customers (e.g., direct mailings or print or broadcast advertisements). This is not anticompetitive; this is competition. In short, exclusive marketing agreements encourage competitive facilities deployment, while preserving customer choice. Any limitation or prohibition on such arrangements would be inconsistent with the Commission's stated objectives in this proceeding.

IV. Nondiscriminatory Access Requirement

In the FNPRM, the Commission proposes to "prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE."[6] As shorthand, the Commission refers to this ban as a "nondiscriminatory access requirement." CoServ believes that the proposal is unlawful, unwise, and unnecessary.

First, as the Commission itself recognizes in the FNPRM, by imposing a nondiscriminatory access requirement the Commission would be walking a tenuous line between lawfully regulating common carriers and unlawfully regulating private property owners. Indeed, while the proposal is framed as a restriction on providers, the label "nondiscriminatory access requirement" belies that the primary impact is on providers. It is private properties owners who would be required to provide "nondiscriminatory access" before they could have any LEC provide telephone service to their property. The Commission does not have jurisdiction to impose the requirement it is now considering.

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[6] *FNPRM* at ¶ 132.

Second, a nondiscriminatory access requirement would be a disincentive for competitive facilities deployment at MTEs. As discussed above, there is a clear disincentive for facilities investment in MTEs where a provider does not have any assurances that it will be able to maintain a solid revenue-generating base of customers.

Third, a nondiscriminatory access requirement would potentially stifle innovation and the evolution of the competitive market in reaching MTE customers. Under a nondiscrimination obligation, MTE property owners will tend to gravitate to cookie-cutter access arrangement to avoid challenges. Such an approach would discourage innovative access arrangements and service offerings in the future that could substantially benefit MTE tenants and the competitive market as a whole. Moreover, this would occur at a time when the telecommunication industry is in the throes of an unprecedented technology revolution with new developments being announced routinely.

Fourth, it is hard to see how a nondiscriminatory access requirement would accomplish anything more than what the Commission has already imposed in prohibiting exclusive access arrangements in commercial MTEs. According to the Commission, the ban on exclusive access arrangements already prohibits "contracts . . . that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access."[7] This umbrella is arguably broad enough to capture discriminatory access requirements without the same thorny questions about "indirect" regulation of property owners involved with the Commission's new proposal. A nondiscriminatory access requirement is not necessary to achieve the Commission's goals.

The nondiscriminatory access requirement proposed by the Commission in the FNPRM is inadvisable as a matter of law, policy, and practice. The Commission should not adopt it.

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[7] *FNPRM* at 36.

CONCLUSION

For the reasons set forth above, CoServ requests that the Commission rule consistent with its comments in this proceeding.

Respectfully submitted,

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